Evidentiary Issues in Child Protective Proceedings

Chapter 11

Summary of Contents

11.1 Scope Note

This chapter contains information concerning the rules of evidence that apply specifically to child protective proceedings. In addition, the chapter contains information on generally applicable evidentiary rules when issues surrounding those rules arise frequently in protective proceedings. For detailed information regarding generally applicable rules of evidence, a more specialized source should be consulted.

11.2 Due Process Requirements for Termination of Parental Rights

Because natural parents have a fundamental liberty interest protected by US Const, Am XIV, in the care, custody, and management of their children, the

state must provide "fundamentally fair" procedures when it seeks to permanently terminate parental rights. *Santosky v Kramer,* 455 US 745, 752–54; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Consequently, when the state seeks to take permanent custody of a child, the state must prove parental unfitness by clear and convincing evidence. *Id.,* 455 US at 769. Instead of considering whether the evidence merely preponderates in favor of termination, the court must consider the quality of the evidence presented. See *Id.*, 455 US at 764, 769.

Nonetheless, the requirements of due process do not prohibit admission of hearsay evidence during a termination proceeding, provided that the evidence is fair, reliable, and trustworthy. *In re Hinson,* 135 Mich App 472, 473–75 (1984), and *In re Ovalle*, 140 Mich App 79, 82 (1985).

11.3 Table Summarizing Evidentiary Rules and Standards of Proof*

*This table is adapted from Newman, *Evidentiary rules and standards of proof in child neglect and abuse cases*, 75 Mich B J 1165, 1168 (1996).

The following table contains evidentiary rules and standards of proof applicable to each stage of child protective proceedings and to protective proceedings involving Indian children.

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Preliminary Inquiries and Preliminary Hearings Where Custody Is Not Requested	In deciding whether to authorize the petition for filing, the court may consider such information and in such manner as the court deems sufficient.	Probable cause that one or more allegations in the petition are true and fall within §2(b) of the Juvenile Code.	MCR 5.962(B) and MCL 712A.11(1); MSA 27.3178(598.11)(1). **See Sections 6.12 and 6.15**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Hearings to Determine Whether to Order Alleged Abuser Out of Child's Home	If custody of the child is not also requested, the court may consider such information and in such manner as the court deems sufficient in deciding whether to authorize the petition for filing. If custody of the child is also requested, the evidentiary rules governing preliminary hearings at which placement of the child is requested apply in deciding whether to authorize the petition for filing. See immediately below.	Probable cause to believe that the person ordered to leave the home committed the alleged abuse, and that person's presence in the home presents a substantial risk of harm to the child's life, physical health, or mental well-being.	MCL 712A.13a(4)(a)–(c); MSA 27.3178 (598.13a)(4)(a)–(c). **See Section 7.19**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Preliminary Hearings Where Custody Is Requested	It is unclear whether the court may consider hearsay evidence that possesses an adequate degree of trustworthiness when deciding whether to authorize the petition for filing.	Probable cause that one or more allegations in the petition are true and fall within §2(b) of the Juvenile Code.	MCR 5.965(B)(9) and MCL 712A.13a(2); MSA 27.3178 (598.13a)(2). **See Sections 7.16 and 11.5**
***The criteria for deciding whether to place the child pending trial contained in MCR 5.965(C)(2) may be considered for guidance. However, the statutory basis for those criteria was eliminated. See 1997 PA 163, deleting §13a(7)(a)–(b) of the Juvenile Code.**	Findings regarding placement of the child may be on the basis of hearsay evidence that possesses an adequate degree of trustworthiness.*	The court must place the child in the most family-like setting available consistent with the child's needs.	MCR 5.965(C)(3)–(4) and MCL 712A.13a(10); MSA 27.3178 (598.13a)(10) **See Section 8.1(B)**
		When abuse is alleged, regardless of whether the alleged abuser is ordered out of the home, the court may not leave the child in or return the child to the home, or place the child in unlicensed foster care, unless the court finds that the conditions of custody at the placement and with the person with whom the child is placed are adequate to safeguard the child from risk of harm to the child's life, physical health, or mental well-being.	MCL 712A.13a(5); MSA 27.3178 (598.13a)(5). **See Section 7.19**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Trials	Evidence must be legally admissible under the rules for civil proceedings or the special rules for child protective proceedings.	Preponderance of the evidence, even where the initial petition contains a request for termination of parental rights.	MCR 5.972(C)(1). **See Sections 11.9 and 12.11**
Initial Dispositional Hearings	The rules of evidence do not apply. All relevant and material evidence or information may be received and relied upon to the extent of its probative value. The court must consider the Case Service Plan and any written or oral information concerning the child offered by a parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or lawyer-guardian ad litem, attorney, or guardian ad litem.	Preponderance of the evidence. Court may enter orders "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained."	MCR 5.973(A)(4)(a), MCL 712A.18(1); MSA 27.3178(598.18)(1), and MCL 712A.18f(4); MSA 27.3178(598.18f)(4). **See Sections 13.2 and 13.16**
Dispositional Review Hearings	The rules of evidence do not apply. All relevant and material evidence or information may be received and relied upon to the extent of its probative value. The court must consider any written or oral information concerning the child offered by a parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or lawyer-guardian ad litem, attorney, or guardian ad litem. The agency report must be accessible to parties and offered into evidence.	Preponderance of the evidence.	MCR 5.973(B)(5) and MCL 712A.19(11); MSA 27.3178(598.19)(11). **See Section 16.13**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Permanency Planning Hearings	The rules of evidence do not apply. All relevant and material evidence or information may be received and relied upon to the extent of its probative value. The court must consider any condition or circumstance that presents a substantial risk of harm to child's life, physical health, or mental well-being.	Preponderance of the evidence.	MCR 5.973(C)(4)(a)–(b) and MCL 712A.19a(4); MSA 27.3178 (598.19a)(4). **See Sections 17.9 and 17.10(A)**
Hearings to Terminate Parental Rights at Initial Disposition	*Three requirements:* 1. Trier of fact found the child within court's jurisdiction; 2. Court finds that one or more allegations in the petition are true, justify immediate termination, and fall under §19b(3) of the Juvenile Code; and 3. Termination is in the best interests of the child.	1. Preponderance of the evidence. 2. Clear and convincing legally admissible evidence. 3. All relevant and material evidence may be received and relied upon to the extent of its probative value.	MCR 5.974(D)(2)–(3) and MCL 712A.19b(4)–(5); MSA 27.3178 (598.19b)(4)–(5). **See Section 18.17(B)**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights Based on Changed Circum-stances	*Three requirements:* 1. New or different circumstances from the offense for which the court assumed jurisdiction, which fall under §19b(3) of the Juvenile Code; 2. New or different circumstance must warrant termination; and 3. Termination is in best interests of the child.	1. Clear and convincing legally admissible evidence. 2. Clear and convincing legally admissible evidence. 3. All relevant and material evidence may be received and relied upon to the extent of its probative value.	MCR 5.974(E). **See Section 18.18(B)–(C)**
Hearings to Terminate Parental Rights: Child in Foster Care	*Two requirements:* 1. The court finds that a basis for parental unfitness listed in §19b(3) of the Juvenile Code exists; and 2. Termination is in the best interests of the child.	All relevant and material evidence may be received and relied upon to the extent of its probative value, but the statutory basis for termination of parental rights must be established by clear and convincing evidence.	MCR 5.974(F). **See Section 18.19(C)–(D)**

Stage of Proceeding	Evidentiary Rules	Standard of Proof	Authorities and Cross-References
Preliminary Hearings Involving Indian Children Where Removal Is Requested	*Emergency Removal* If the child resides or is domiciled on a reservation but is temporarily off the reservation, child may be removed only to prevent immediate physical harm to the child. If the child is not residing or domiciled on reservation, child may be temporarily removed if child's health, safety, or welfare is endangered.		MCR 5.980(B) and 25 USC 1922. **See Section 20.7**
	Non-emergency Removal Child may be removed if services designed to prevent breakup of Indian family have been furnished, and continued custody by Indian parent or custodian is likely to result in serious emotional or physical damage to child.	Clear and convincing evidence, including testimony by qualified expert witnesses.	MCR 5.980(C)(1) and 25 USC 1912(e). **See Section 20.8**
Hearings to Terminate Parental Rights to Indian Child	Parental rights may not be terminated unless continued custody by the parent will likely result in serious emotional or physical damage to the child.	Beyond a reasonable doubt, including testimony of qualified expert witnesses.	MCR 5.974(A)(1) and (F)(3), 5.980(D), and 25 USC 1912(f). **See Section 20.10**
	One or more of the state statutory grounds for termination must be proven.	Clear and convincing evidence.	MCL 712A.19b(3); MSA 27.3178 (598.19b)(3), and *In re Elliott,* 218 Mich App 196, 209–10 (1996). **See Section 20.10**

11.4 Abrogation of Privileges in Protective Proceedings

Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute grounds for

excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding resulting from a report made under the Child Protection Law. MCL 722.631; MSA 25.248(11).

In *In re Brock*, 442 Mich 101 (1993), the parent's neighbor, who baby-sat for the children, reported suspected abuse, and testimony of a psychologist and a physician was admitted to show the parent's fitness for custody of a child not the subject of the proceeding. The Michigan Supreme Court held that abrogation of privileges under MCL 722.631; MSA 25.248(11), does not depend upon whether reporting was required or not, or whether the proffered testimony concerned the abuse or neglect that gave rise to the protective proceeding. *Id.*, at 117. Instead, the testimony must result from a report of abuse or neglect and be relevant to the proceeding. *Id.*, at 119–20. In *Brock*, a physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding.*

*See Sections 2.5 and 2.6 for a discussion of mandatory and non-mandatory reporting of abuse and neglect.

In addition to the abrogation of privileges under the Child Protection Law, MCR 5.973(A)(4)(d) provides that no assertion of an evidentiary privilege, other than the attorney-client privilege, shall prevent the receipt and use, during the dispositional phase of a proceeding, of materials prepared pursuant to a *court-ordered* examination, interview, or course of treatment.

11.5 Admission of Hearsay Evidence at Preliminary Hearings

The evidentiary standards in MCR 5.965 applicable to the "probable-cause phase" of a preliminary hearing are undefined. Contrast this with MCR 5.935(D)(4), which provides that in a preliminary hearing in a delinquency case "[a] finding of probable cause . . . may be based on hearsay evidence which possesses adequate guarantees of trustworthiness." MCR 5.965(C)(3), which allows the court's findings regarding placement to be made "on the basis of hearsay evidence that possesses an adequate degree of trustworthiness," may also apply to the court's finding that probable cause does or does not exist to believe that the respondent committed an offense against the child. See MCR 5.962(B) (at preliminary inquiry, probable cause may be established "with such information and in such a manner as the court deems sufficient").

11.6 Exceptions to the "Hearsay Rule" Commonly Relied Upon in Protective Proceedings

The rules of evidence generally prohibit the admission of hearsay evidence unless the evidence falls under one of numerous exceptions to the "hearsay rule." See MRE 801 (definition of hearsay) and MRE 802 (hearsay not admissible except as provided by the rules of evidence). The following are exceptions to the hearsay prohibition commonly relied upon in child protective proceedings.

A. Admissions by Party Opponents Are Excluded From the "Hearsay Rule"

A party's own statement is not hearsay if it is offered against the party. MRE 801(d)(2). Thus, statements by parents or guardians may be offered against these parties in child protective proceedings. See MCR 5.903(A)(13)(b) (definition of "party" includes parents or guardians). A statement by a "party-opponent" need not be "against that party's interest" to be admitted, as is required for admissibility of statements under MRE 804(b)(3). See *Shields v Reddo*, 432 Mich 761, 774, n 19 (1989).

Note: For an argument supporting the admission of children's statements describing abuse at the hands of their parents as "statements against interest" under MRE 804(b)(3), see Vandervort, *Hearsay in child protection proceedings*, 1 Michigan Child Welfare Law Journal 37 (1997).

B. Present Sense Impressions

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is admissible under the "present sense impression" exception to the hearsay rule. MRE 803(1). The Michigan Supreme Court has allowed the admission of a statement made four minutes after the event described. *Johnson v White*, 430 Mich 47, 56–57 (1988).

This exception may allow the admission of statements describing acts of abuse to protective services workers by telephone. See, generally, *City of Westland v Okopski*, 208 Mich App 66, 77–78 (1994) (tape of emergency call properly admitted to show why police responded, rather than to prove the truth of the assertions on the tape, and taped statements, even if hearsay, were present sense impressions under MRE 803(1)), and *People v Hendrickson*, 459 Mich 229, 235–40 (1998) (before tape of statements to emergency operator could be admitted at trial, independent evidence of the alleged assault was required, but photographs showing victim's injuries that were consistent with the assault described to the emergency operator satisfied this requirement).

C. Excited Utterances

MRE 803(2) allows admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There are three requirements that a statement must meet to be admissible:

> "'To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion;

> (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion.'"

People v Straight, 430 Mich 418, 424 (1988), quoting *People v Gee*, 406 Mich 279, 282 (1979) (footnote omitted).

The Michigan Supreme Court has also required that there be independent evidence of the startling event before the statement may be admitted. *People v Burton*, 433 Mich 268, 280 (1989). See also *People v Kowalak (On Remand)*, 215 Mich App 554, 559–60 (1996) (requirement of independent evidence of startling event may be met with circumstantial evidence).

Sexual assault may be a "startling event" for purposes of this rule. *People v Crump*, 216 Mich App 210, 213 (1996). The amount of time that passes between the event and the statement is not by itself determinative of the admissibility of statements under this exception. Instead, the court should determine whether the interval was long enough to make fabrication possible, and whether the declarant's emotional state allowed for fabrication. *People v Edwards*, 206 Mich App 694, 697 (1994).

In the following cases, the statements were found admissible as "excited utterances":

- *People v Smith*, 456 Mich 543, 549–55 (1998) (statements made 10 hours after sexual assault and in response to unrelated questioning were admissible);
- *People v Garland*, 152 Mich App 301, 307 (1986) (statements by seven-year-old victim of sexual abuse made one day after event were admissible where child had limited mental ability and was threatened);
- *People v Lovett*, 85 Mich App 534, 543–45 (1978) (statements by three-year-old witness to rape-murder made one week later were admissible; child stayed with grandparents during the interval between event and statements, and statements were spontaneous);
- *People v Houghteling*, 183 Mich App 805, 806–08 (1990) (statements of five-year-old made 20 hours after sexual assault in response to mother's questions were admissible);
- *People v Soles*, 143 Mich App 433, 438 (1985) (statements made five days after particularly heinous sexual assault were admissible); and
- *People v Draper*, 150 Mich App 481, 486 (1986) (statements by three-year-old made a week after sexual assault by stepfather were admissible).

In the following cases, the statements were found inadmissible as "excited utterances":

- *People v Straight*, 430 Mich 418, 423–28 (1988) (statements regarding sexual abuse made one month after event, during examination, and in response to repeated questioning were inadmissible);

- *People v Sommerville*, 100 Mich App 470, 489–90 (1980) (statements to police made 24 hours after assault were inadmissible);
- *People v Scobey*, 153 Mich App 82, 85 (1986) (statements by 13 year old two and five days after event were inadmissible); and
- *People v Lee*, 177 Mich App 382, 385–86 (1989) (statements made 17 days after event were inadmissible).

D. Statements of Existing Mental, Emotional, or Physical Condition

MRE 803(3) excepts statements of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

E. Statements Made for Purposes of Medical Treatment or Diagnosis

Under MRE 803(4), statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment, also constitute an exception to the "hearsay rule."

This exception is frequently used in child abuse or neglect cases. Typically, a child suspected of being neglected or abused is examined by a physician and makes statements concerning injuries and their cause. Note, however, that the exception is not limited to statements made to physicians. See *People v James*, 182 Mich App 295, 297 (1990) (statements made to child sexual abuse expert); *People v Skinner*, 153 Mich App 815, 821 (1986) (statements made to child psychologist); and *In re Freiburger*, 153 Mich App 251, 255–58 (1986) (statements made to psychiatric social worker).

Statements identifying the perpetrator must be reasonably necessary to the treatment of the declarant. *People v Meeboer (After Remand)*, 439 Mich 310, 330 (1992). The trial court should weigh the following factors in determining whether a statement is admissible:

- the age and maturity of the declarant;
- the manner in which the statements were elicited (for example, whether leading questions were used);
- the manner in which the statements were phrased (for example, child-like terminology may be evidence of genuineness);
- the use of terminology unexpected of a child of similar age;

- who initiated the examination (prosecutorial initiation may be evidence that the purpose of the examination was not solely for medical examination and treatment);
- the timing of the examination in relation to the assault;
- the timing of the examination in relation to the trial;
- the type of examination (statements made during course of treatment of psychological disorders may not be as reliable);
- the relation of the declarant to the person identified; and
- the existence of or a lack of a motive to fabricate.

Id., at 324–25. See also *People v LaLone,* 432 Mich 103, 109–17 (1989) (statements identifying perpetrator made to psychologist not reasonably necessary for medical treatment or diagnosis), and *People v Hyland,* 212 Mich App 701, 704–07 (1995) (statements to physician by nine year old regarding sexual abuse by father admissible under test outlined above).

F. Records of Regularly Conducted Activity

MRE 803(6) states:

> "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

A report or record generated in anticipation of litigation is not admissible as a "record of regularly conducted activity." See *People v Huyser,* 221 Mich App 293, 298–99 (1997). In child protective proceedings, this exception allows for the admissibility of Family Independence Agency records, medical records concerning the child, and police reports. The proponent of such records must establish the following foundation to allow the record to be admitted for its truth:

- the record was made at or near the time in question;

- **F** the record was made by, or from information transmitted by, a person with knowledge;
- **F** the record was made in the course of a regularly conducted business activity;
- **F** the record was made by a person whose practice it was to make such records; and
- **F** all of the above requirements are testified to by a custodian of the record or other qualified person.

See *Price v Long Realty, Inc*, 199 Mich App 461, 468 (1993).

*See Section 11.6(G), below.

Police reports may be admissible under this rule, or under MRE 803(8)* as public records.

"Business records," as "records of regularly conducted activity" are often termed, must contain only the observations of the reporting person and not the hearsay statements of others, unless these statements of others contained in the record ("hearsay within hearsay") are admissible under another exception to the "hearsay rule." *In re Freiburger*, 153 Mich App 251, 259–61 (1986).

G. Public Records

MRE 803(8) excepts the following from the "hearsay rule": records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.

*See Sections 2.5–2.9 for a detailed discussion of reporting requirements.

Thus, a police report may be admissible under this rule, since child protective proceedings are not criminal cases. The rule may also allow admission of Form FIA 3200, which is used to document a report of suspected child abuse or neglect,* or portions of the child protective services manual.

As with "business records," "public records" must contain only the observations of the reporting person and not the hearsay statements of others, unless these statements of others contained in the record ("hearsay within hearsay") are admissible under another exception to the "hearsay rule."

H. Judgment of Previous Conviction

Child protective proceedings and proceedings to terminate parental rights often arise from the same circumstances as a criminal prosecution. Thus, evidence of a conviction in a related criminal case may be used to advance protective or termination proceedings.

Under MRE 803(22), judgments of felony convictions entered after trial or plea are admissible. The use of guilty pleas, however, is limited by MRE 410, which prohibits use of evidence of a guilty plea later withdrawn, a plea of nolo contendere, an offer to plead guilty or nolo contendere, or statements made in connection with such pleas or offers to plead.

In *In re Andino,* 163 Mich App 764, 768–73 (1987), the Court of Appeals held that where independent proof has been presented of the conduct leading to a criminal charge to which the respondent-parent pled no contest, a judgment of conviction or sentence may be received as evidence in a termination proceeding. Although MRE 410 prevents evidence of a plea of no contest, or statements made in connection with such a plea, from being admitted as evidence against the person entering the plea in "any civil proceeding," the rules applicable to the dispositional phase of child protective proceedings allow such evidence to be considered. These more specific rules govern. *Id.,* at 769–70. In addition, allowing consideration of such evidence is consonant with the general goal of the Juvenile Code, which is to protect children. *Id.,* at 772–73.

I. Residual Exceptions to the "Hearsay Rule"

Two residual exceptions to the hearsay rule, MRE 803(24) and MRE 804(b)(6), allow for the admissibility of statements not specifically covered by another exception to the hearsay rule if the statements have equivalent circumstantial guarantees of trustworthiness. Each of these rules contains notice provisions that must be met before a court may admit statements under them.

In addition to the notice requirements, under MRE 804(b)(6), the court must first determine that the declarant is "unavailable as a witness." "Unavailability" includes the following circumstances:

- the witness is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- the witness persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- the witness has a lack of memory of the subject matter of the declarant's statement;
- the witness is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;
- the witness is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under MRE 804(b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

MRE 804(a)(1)–(5).

After determining that the witness is unavailable, the court may admit the statement under MRE 804(b)(6) if:

- the statement is offered as evidence of a material fact;
- the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and
- the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Under MRE 803(24), the court may admit statements, after considering the factors listed immediately above, without a finding that the declarant is "unavailable" to testify concerning the statements.

For cases analyzing the admissibility of statements under these residual exceptions to the hearsay rule, see *People v Welch,* 226 Mich App 461, 464–68 (1997), and cases cited therein, and *United States v NB,* 59 F3d 771, 776 (CA 8, 1995).

11.7 Admissibility of Statement by Child Under 10 Years of Age Describing Act of Child Abuse

*See Section 11.6, above, for a discussion of exceptions to the hearsay rule commonly relied upon in child protective proceedings.

A statement by a child under 10 years of age describing an act of child abuse as defined in MCL 722.622(c); MSA 25.248(2)(c), of the Child Protection Law, performed with or on the child, not otherwise admissible under an exception to the hearsay rule,* may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature and circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act. MCR 5.972(C)(2).

Under the Child Protection Law, "child abuse" is defined as harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare, or by a teacher or teacher's aide, that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment. MCL 722.622(e); MSA 25.248(2)(e). A "child" is a person under age 18. MCL 722.622(d); MSA 25.248(2)(d).

"Sexual abuse" is defined as engaging in "sexual contact" or sexual penetration" as those terms are defined in §520a of the Penal Code:

- "Sexual contact" means the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.
- "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

MCL 722.622(q); MSA 25.248(2)(q), and MCL 750.520a(k) and (l); MSA 28.788(1)(k) and (l).

"Sexual exploitation" includes allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity. MCL 722.622(r); MSA 25.248(2)(r), and MCL 750.145c(e); MSA 28.342a(e).

The court should examine the totality of the circumstances surrounding the making of the statement to determine whether there are adequate indicia of trustworthiness. Such circumstances include the spontaneity of the statement, consistent repetition of the statement, the child's mental state, the child's use of terminology unexpected by a child of similar age, and lack of a motive to fabricate. See *Idaho v Wright*, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990) (construing a residual hearsay exception), *In re Brimer*, 191 Mich App 401, 405 (1991), and *In re Brock*, 193 Mich App 652, 670–71 (1992), rev'd on other grounds 442 Mich 101 (1993) (relying on *Wright* to construe MCR 5.972(C)(2)).

Note also that the court must find sufficient corroborative evidence of the abusive act and may not rely on such corroborative evidence to establish the trustworthiness of the statement. *Wright, supra*, at 819–24.

Note: Proposed amendments to the Michigan Court Rules and Michigan Rules of Evidence would eliminate MCR 5.972(C)(2) ("tender years exception") and allow for admissibility of statements by a child under 10 years of age describing acts of *sexual abuse* under certain circumstances pursuant to MRE 803A. See AO 98-18. These amendments, if implemented, would limit admissibility to statements describing "sexual abuse," not "child abuse" as currently allowed under MCR 5.972(C)(2), and would allow admission of only the first corroborative statement about an incident of sexual abuse. There may also be a conflict between the proposed amendments and MCL 722.628(6); MSA 25.248(8)(6) (required use of interviewing protocol), which assumes that a statement obtained from a child describing physical abuse through proper use of an interviewing protocol will be admissible. MRE 803A currently states in relevant part:

"A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

"(1) the declarant was under the age of ten when the statement was made;

"(2) the statement is shown to have been spontaneous and without indication of manufacture;

"(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

"(4) the statement is introduced through the testimony of someone other than the declarant.

"If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

"A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement."

11.8 Evidence of the Treatment of One Child Is Admissible to Show Treatment of Sibling

Evidence of the treatment of one child is probative of how the parent may treat the child's siblings. See SJI2d 97.07, and the following cases:

- *In the Matter of LaFlure*, 48 Mich App 377, 392 (1973) (respondent's treatment of her younger son was relevant at hearing to terminate respondent's parental rights to her older son);
- *In re Dittrick Infant*, 80 Mich App 219, 222 (1977) (where respondents' parental rights were terminated to respondent-mother's first child on grounds of continuing physical and sexual abuse, allegations of the

neglect of the first child were relevant to a finding of neglect sufficient to allow the court to take jurisdiction over respondents' second child);

- *In re Kantola*, 139 Mich App 23, 28–29 (1984) (where evidence showed that respondents treated their son well but sexually, physically, and verbally abused their daughters, respondents' treatment of their son was not conclusive of their ability to provide a fit home for their daughters);
- *In re Futch*, 144 Mich App 163, 166–68 (1984) (evidence that respondents were convicted of manslaughter in the beating death of respondent-mother's first child supported termination of respondents' parental rights to a subsequent child);
- *In re Andeson*, 155 Mich App 615, 622 (1986) (where evidence suggested that respondent's physical abuse of a sibling led to the sibling's death, the probate court properly considered that evidence in terminating respondent's parental rights to another child);
- *In re Smebak*, 160 Mich App 122, 128–29 (1987) (evidence that respondent-mother's mental illness prevented her from providing proper care of sibling was probative of her ability to care for another child);
- *In re Emmons*, 165 Mich App 701, 704–05 (1988) (evidence of respondent-father's prior guilty plea to charge of sexually assaulting child's siblings was admissible to provide basis for jurisdiction over child); and
- *In re Powers*, 208 Mich App 582, 592–93 (1995) (where respondent-custodian was found to have physically abused respondent-mother's first child, evidence of that abuse was relevant to respondent-custodian's ability to provide proper care and custody for a sibling subsequently born to respondent-custodian and respondent-mother).

11.9 Evidence of Other Crimes, Wrongs, or Acts

MRE 404(b)(1) states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. This rule may be relied upon to allow admission of evidence in child protective proceedings. See, generally, *People v VanderVliet*, 444 Mich 52 (1993).

11.10 Evidence Admitted at Hearing May Be Considered at Subsequent Hearings

Evidence admitted at one hearing in a protective proceeding may be considered as evidence at all subsequent hearings. See *In re Slis*, 144 Mich App 678, 685 (1985) (in its findings of fact and conclusions of law, trial

judge summarized family's history of involvement with community service agencies); *In re Adrianson,* 105 Mich App 300, 317 (1981) (allegations admitted at hearings on temporary custody of children may be considered by court at termination hearing); *In the Matter of Sharpe,* 68 Mich App 619, 625–26 (1976) (hearings in protective proceedings are to be considered "as a single continuous proceeding"); and *In the Matter of LaFlure,* 48 Mich App 377, 391 (1973) (due to the nature of the decision to terminate parental rights, court must be apprised of all relevant circumstances). The trial court may also take judicial notice of its court file. See MRE 201.

11.11 Child Witnesses Are Not Presumed Incompetent

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in the Michigan Rules of Evidence. MRE 601.

Pursuant to this rule, a court must evaluate each witness individually, and there is no per-se exclusion of witnesses under a certain age. MCL 600.2163; MSA 27A.2163, was repealed by 1998 PA 323. Thus, a court is no longer required to determine through public or private questioning whether a child under the age of 10, when offered as a witness, has sufficient intelligence and sense of obligation to the truth to be competent to testify. The child's testimony may be given on a promise to tell the truth instead of upon oath or affirmation, and such testimony is to be given such credit as it appears to deserve.

11.12 Expert Testimony in Protective Proceedings

Michigan Rules of Evidence 702 through 706 govern the admissibility of expert testimony in civil and criminal proceedings. For detailed information on the use of expert testimony, see *Scientific Evidence* (MJI, 1994), Chapter 2, and Sections 18.2 ("Battering Parent Profile/Syndrome"), 18.6 ("Sexual Abuser Profile/Syndrome"), 18.9 ("Battered Child Syndrome"), and 18.12 ("Sexually Abused Child Syndrome"). See also Myers, *Evidence in child abuse and neglect cases* (3d ed), Vol 1, Sections 5.39–5.42, pp 539–50, for discussion of syndrome evidence.

In cases involving child sexual abuse, a psychologist's opinion as to whether the abuse actually occurred "is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony." *In re Brimer,* 191 Mich App 401, 407 (1991), citing *People v Beckley,* 434 Mich 691, 726–29 (1990). It is also improper for the psychologist to evaluate the child's credibility. *Brimer, supra,* quoting *Beckley, supra,* at 737.

See, generally, *In re Hulbert,* 186 Mich App 600, 605 (1990) (Court of Appeals reversed order terminating respondent's parental rights based almost exclusively on speculative opinions of psychologists as to

respondent's future ability to become a fit parent), *In re Rinesmith*, 144 Mich App 475, 482–83 (1985) (no error occurred where expert in child abuse testified concerning a hypothetical situation including facts from the case at bar), *In re Nye*, 145 Mich App 742, 745–47 (1985) (despite respondent's compliance with Case Service Plan, termination of parental rights was proper, where two psychiatrists testified that respondent suffered from schizophrenia), and *In the Matter of Bell*, 138 Mich App 184, 187–88 (1984) (trial court did not err in failing to appoint independent expert witness for respondent-parent who did not dispute the validity of the three expert witnesses presented by petitioner).

If a child is placed outside of his or her home, and if a physician has diagnosed the child's abuse or neglect as involving failure to thrive, Munchausen Syndrome by Proxy, Shaken Baby Syndrome, a bone fracture that is diagnosed as a result of abuse or neglect, or drug exposure, the court must allow the child's attending or primary care physician to testify regarding the Case Service Plan at a judicial proceeding to determine if the child is to be returned home. MCL 712A.18f(6)–(7); MSA 27.3178(598.18f)(6)–(7).*

*This requirement is effective March 1, 1999. 1998 PA 479. See Sections 13.18 and 13.20 for a detailed discussion of this requirement.

11.13 Requirements for the Use of Photographs

As with other types of demonstrative evidence, photographs are admissible if they help illuminate any material point in issue. *People v Midgyett*, 49 Mich App 663, 665 (1973), and *People v Levy*, 28 Mich App 339, 342 (1970) (photographs of injuries to child's body admissible to support medical testimony that injuries were result of a beating). Photographs that accurately depict the injuries and tend to prove a fact in dispute are admissible despite their likelihood of exciting passion or prejudice. *People v Mills*, 450 Mich 61, 77–78 (1995), modified and remanded on other grounds 450 Mich 1212 (1995). To lay a proper foundation for the admission in evidence of a photograph, a person familiar with the scene or object photographed must testify that the photograph accurately reflects the scene or object photographed. The photographer need not testify. *People v Riley*, 67 Mich App 320, 322 (1976), rev'd on other grounds 406 Mich 1016 (1979).

11.14 Prohibition Against Calling Lawyer-Guardian Ad Litem as Witness

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3); MSA 27.3178(598.17d)(3). A lawyer-guardian ad litem's case file is not discoverable. *Id.**

*These rules are effective March 1, 1999. 1998 PA 480. See Section 7.11 (powers and duties of lawyer-guardians ad litem).